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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff/Respondent, :  
vs. : Case No. 18976  
FRED VELARDE, :  
Defendant/Appellant. :

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BRIEF OF APPELLANT

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Appeal from a verdict of guilty against the appellant  
in the Second Judicial District Court, County of Morgan,  
State of Utah, the Honorable J. Duffy Palmer presiding.

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**FILED**

JUN 15 1983

*Clerk, Supreme Court, Utah*

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#### CASES CITED

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#### OTHER LEGAL TREATISES

First Preliminary Hearing Transcript, Pages 43, 63, 64, 66, 71, 92, 93, 94, 95, 96, 103, 104, 105, 109, 110, 111.....	1,2,6,7
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STATE OF UTAH,	:	BRIEF OF APPELLANT
Plaintiff/Respondent,	:	
VS.	:	Case No. 18976
FRED VELARDE,	:	
Defendant/Appellant.	:	

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STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from a conviction of a second degree felony, theft, in the Second Judicial District Court of Morgan County, State of Utah.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty of a second degree felony, theft, in a jury trial held before the Honorable J. Duffy Palmer, on November 16, 1982. Appellant was sentenced to a term of not less than one year and not more than 15 years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction on the grounds as set forth in the following argument.

STATEMENT OF THE FACTS

In the early morning hours of October 1, 1982, Officer Vincent K. Nelson of the Morgan County Sheriffs Department approached Fred Velarde, who was asleep in a vehicle. The officer had Mr. Velarde get out of the vehicle, frisked him, and had him sit in his patrol car. (T. 63-64) After confirming that the vehicle had been stolen from a business in Salt Lake City,

Utah, the officer placed Mr. Velarde under arrest and advised him of his constitutional rights per miranda. In response to the officer's questioning, Mr. Velarde, who at the time was quite intoxicated, said little. (T. 66) Mr. Velarde was subsequently charged with a second degree felony of theft, and was brought to trial before the Honorable J. Duffy Palmer sitting with a jury on November 16, 1982.

The appellant contended at trial that he had no part in the theft but was merely picked up while hitch-hiking and passed out in the truck which was actually stolen by the States' witness, John Pentz. Mr. Pentz admitted to driving the truck into Morgan, his place of residence, but alleged that he had been picked up by defendant in Salt Lake City and that defendant drove until he passed out on the interstate highway. (T. 43) When the Morgan police arrive at the truck the defendant is passed out in the passenger seat leaning towards the middle of the truck. (T. 71) The sole testimony presented by the defense was that of Mr. Velarde. During the cross-examination of Mr. Velarde, the prosecutor, over the repeated objections of defense counsel, questioned the appellant extensively on his decision to remain silent after arrest, and his failure to proclaim his innocence. The court did not attempt to admonish the State's attorney or instruct the jury to disregard the questions and arguments as improper.

These questions and arguments were received into evidence over the urgent objections of defense counsel. The court never

improper, and nothing was done to counteract the prejudicial effect such an implication had on the jury.

#### ARGUMENT

##### POINT I

THE PROSECUTOR'S REFERENCE, DURING BOTH CROSS-EXAMINATION AND ARGUMENT TO THE JURY, REGARDING APPELLANT'S POST ARREST SILENCE, VIOLATED APPELLANT'S FIFTH AMENDMENT RIGHT TO SILENCE AND IS A PREJUDICIAL AND THEREFORE REVERSIBLE ERROR.

The absolute right against self-incrimination granted criminal defendants by the Fifth Amendment to the Constitution of the United States, has been solidly defined and augmented in numerous decisions by the U.S. Supreme Court. In Miranda v. Arizona, 348 US 436, 16 L ED 2d 694, 86 S Ct. 1602, (1966), the court held that any confession obtained during custodial interrogation of criminal defendants can be entered into evidence only if such confession was procured after meaningfully advising the defendant of his constitutional right to silence, followed by a knowing and intelligent waiver of these rights.

The court went on to address the issue of prosecutorial comment on a defendant's exercise of his right to silence and attempts to infer guilt from such exercise. In footnote 37, the court said,

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."  
Id at 468.



In the case of United States v. Hale, 422 U.S. 71, 45 L. Ed 2d 99, 95 S Ct 2133 (1975), the court addressed more specifically the issue presently before this court. By affirming the reversal of a defendant's conviction on the grounds that his Fifth Amendment rights were violated when the prosecutor on cross-examination asked defendant why he had not given the police his alibi defense when questioned, the court left no doubt that such prosecutorial conduct would render a defendant's Fifth Amendment protections a helpless facade. It is important to note that the reversal was affirmed, notwithstanding the courts instructions to the jury to disregard the improper questioning. The court thus held "We find that the probative value of respondents pre-trial silence in this case was outweighed by the prejudicial impact of admitting it into evidence." Id at 73.

In these two decisions, the U.S. Supreme Court made it clear that reference to a defendant's proper exercise of his Fifth Amendment privilege against self-incrimination by the prosecutor was a violation of the defendant's constitutional rights. However, the question remained unanswered of whether a prosecutor could comment for impeachment purposes on a defendant's failure to explain his innocence after waiving or partially waiving his Fifth Amendment right to silence. This point was resolved by the court in the case of Doyle v. Ohio, 426 U.S. 610, 49 L. Ed 2d 91, 96 S Ct. 2240 (1976). In this case, defendant and a co-defendant were arrested and charged with selling marijuana to a police informant. The defendant was given a miranda warning while in custody and waived his rights electing to speak to the police.

during the trial, and over the objection of defense counsel, the prosecutor extensively questioned the defendant on his failure to tell police at time of arrest his exculpatory story. The prosecutor, again over the objection of defense counsel, was permitted to further argue the defendant's post-arrest silence to the jury. In reversing the conviction, the court said, "We hold that the use for impeachment purposes of petitioners silence, at the time of arrest and after receiving miranda warnings, violated the due process clause of the Fourteenth Amendment." Id at 619.

The Utah Supreme adheres to the standard set forth in Doyle and in the case of State v. Wiswell, 639 P2d 146 (Utah, 1981), has fortified the protection of a defendant's constitutional rights. In the Wiswell case, the prosecutor repeatedly attempted to introduce into evidence the defendant's exercise of his constitutional right to remain silent. Defense counsel's objection were sustained on all three cross-examination questions as well as on the prosecutors closing argument to the jury. Although the trial courts attempted to rectify the improper references by striking the questions and admonishing the jury to disregard them, the appellate court reversed the conviction. In so deciding, the court held that

"The continued attempts by the prosecutor to put the defendant's silence before the jury after his having been advised of his right to remain silent amounts to prosecutorial misconduct. The references to defendant's silence are fundamental error, which could have affected the result and are therefore prejudicial."  
Id at 141.

The facts of the case at bar, present a striking similarity to the facts in Doyle, and present an even stronger argument for reversal than that of State v. Wiswell. Testimony elicited at trial showed that at the time of arrest, Mr. Velarde was extremely intoxicated (T. 66), and his answers to questions posed by the officer were short and confused, leaving doubt as to whether defendant knowingly waived his Fifth Amendment rights. The transcript of the trial shows that the prosecutor referred to Mr. Velarde's exercise of his Fifth amendment right no less than eight times, including the following exchanges:

Question: "Mr. Velarde, on that evening, why didn't you tell Officer Nelson your side of the story?" (T. 92)

Question: "And it is your position Mr. Velarde...that you chose not to tell Mr. Nelson anything because you can't trust police officers?" (T. 94)

Question: "So you have elected to go forward with this entire criminal prosecution, be arrested for vehicle theft and wait until today for the first time to give your version of what happened?" (T. 94)

Question: "Mr. Velarde, this is the first time that you have elected to state your version of what occurred in Salt Lake County and in Morgan County, is that true?" (T. 96) (See also T. 92-96).

The prosecutor further commented on the appellants exercise of his Fifth Amendment right to silence throughout his argument to the jury. This argument included the following statements, among others:

"And why does Mr. Velarde wait six weeks? Why not at the accident scene say, I'm innocent? Mr. Pentz had that truck not me. You have got the wrong man. I don't even know how to drive a four-speed. What's wrong with the outrage? My heavens, there, according to Mr. Velarde, the guilty man is walking away...Where is the outrage? Where is the indignation? Where is the sense of being victimized?" (T. 104-105)

(See also T. 103-105 and 109-111.)

Furthermore, although defense counsel repeatedly and vehemently objected to these violations of the defendant's constitutional rights, the court allowed the questions to stand and made no effort to minimize their prejudicial effect through either jury admonition or jury instruction. This left defense counsel with the impossible task of attempting to nullify the prejudice through his closing argument. As the decision in State v. Wiswell, made clear, such conduct on the part of a prosecuting attorney renders the defendant void of Fifth and Fourteenth Amendment protections even where the court attempts to mitigate the damage. How much worse then is such misconduct when the court allows a prosecutor to proceed with impunity as in the present case? The U.S. Supreme Court's decisions in Miranda, Hale and Doyle v. Ohio, and the Utah Supreme Court's decision in State v. Wiswell, all hold that references to the defendant's post arrest silence during questioning or argument to the jury, constitutes a fundamental error so prejudicial as to require a reversal of Mr. Velarde's conviction.

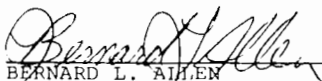
#### CONCLUSION

The prejudicial effects of the prosecutors comments concerning appellants exercise of his right to silence are

obvious. In the present case, the county attorney used the defendant's exercise of his Fifth Amendment rights to discredit appellants testimony, and, in fact, based his entire closing argument on that same constitutionally protected silence. The case of Doyle v. Ohio, is controlling in the case before this court and holds that the appellants Fourteenth Amendment rights to due process of the law were violated by the prosecutors improper use of appellants post arrest silence to impeach his testimony. Additionally, the case of State v. Wiswell rules specifically that prosecutors use of the appellants silence during the closing arguments to the jury was prejudicial error.

The appellant therefore prays that this court reverse the lower courts decision and remand the case back to the Second Judicial District Court of Morgan County for proper disposition consistent with the appellants Fifth and Fourteenth Amendment rights.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of June, 1983.

  
BERNARD L. ALLEN  
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the above and foregoing brief to the Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid, this 7<sup>th</sup> day of June, 1983.

Sherry Thompson  
SHERRI THOMPSON, Secretary